Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

AMANDA CHAPARRO,

Petitioner,

vs.

IBP, INC.,

Respondent,

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit.

PETITION FOR WRIT OF CERTIORARI

David O. Alegria
McCULLOUGH, WAREHEIM & LaBUNKER, P.A.
1507 S.W. Topeka Boulevard
Topeka, Kansas 66612
(913) 233-2323

45 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether plaintiff presented sufficient evidence to allow her case to be decided by the jury.
2. Whether the court abused its discretion in excluding the testimony of Jennifer Dombkowski and Timothy Russell.

LIST OF ALL PARTIES

Petitioner/Appellant, Amanda Chaparro.

Respondent/Appellee, IBP, inc.

There are no parent of subsidiary companies to be listed.

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BASIS FOR JURISDICTION

DATE OF JUDGMENT
December 24, 1996

DATE OF ORDER ON REHEARING
February 11, 1997

STATUTORY PROVISIONS FOR JURISDICTION
28 U.S.C. § 2101(c)

NOTIFICATION
N/A

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

Petitioner's cause of action is based on State common law.

STATEMENT OF THE CASE

This is a retaliatory discharge case, a tort action. The petitioner, Amanda Chaparro, was fired from her employment with respondent, IBP, inc., in retaliation for her pursuit of workers' compensation remedies under the Kansas Workers Compensation Act, and for absences related to her work-related injury.

In a judgment from the bench at the conclusion of all evidence at trial on February 9, 1995, District Judge G. T. Van Bebber issued judgment as a matter of law for defendant pursuant to Fed. R. Civ. P. 50(a). Judge Van Bebber found that plaintiff failed to present clear and convincing evidence of retaliatory discharge.

In this petition for certiorari, plaintiff submits to the court that plaintiff presented sufficient evidence for a jury to have decided her case. Plaintiff survived defendant's motion for summary judgment and directed verdict at the close of plaintiff's evidence. However, at the conclusion of all of the evidence, and just immediately prior to deliberations by the jury, the court, improperly entered judgment as a matter of law on behalf of defendant.

Jurisdiction of this action was conferred upon the district court on the basis of diversity of citizenship, 28 U.S.C. § 1332. Ms. Chaparro, the petitioner, is an individual, resident of the state of Kansas. Respondent is a Nebraska corporation with its primary place of business in Nebraska.

ARGUMENT

1. Whether plaintiff presented sufficient evidence to allow her case to be decided by the jury.

Defendant alleges in this case that it fired Ms. Chaparro because she violated its unexcused absenteeism policy. More specifically, defendant contends that Ms. Chaparro was fired for three "no call, no show" unexcused absences. The alleged absences occurred on October 29, 1990, May 11 and May 13, 1991.

Under Kansas law, the analysis of this case must employ the burden shifting approach of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In this case,

defendant alleges that it fired Ms. Chaparro for three unexcused absences. Plaintiff presented substantial evidence that the absence of October 29, 1990 was a far cry from being a no call, no show unexcused absence. In fact, Ms. Chaparro worked most of her shift and left early for a doctor's appointment. Following her doctor's appointment her shift was over and she did not return to work. The evidence in this case indicates that under any analysis or definition of the no call no show absence, Ms. Chaparro's absence of October 29, 1990 does not constitute a no call no show.

With respect to the absences of May 11 and 13, 1991, it was clear from the evidence that defendant had sent Ms. Chaparro home sick on May 10, 1991 and instructed her not to come back to work until she had a release from a physician. She was not able to obtain a release and see a physician until May 13, 1991 when she returned to work. She worked for a period of time until she was called to the office and fired.

Plaintiff presented evidence that defendant fired Ms. Chaparro as a pretext to conceal its retaliatory motives because of her exercise of statutory rights under the Kansas Workers' Compensation Act. Defendant does not articulate any other reason for firing Ms. Chaparro. Therefore, the issue of causal connection between the exercise of statutory rights and her firing must be shown by circumstantial evidence. In this regard, Ms. Chaparro presented an abundance of circumstantial evidence indicating that

defendant's reason for firing Ms. Chaparro was in retaliation for her exercise of statutory rights under the Kansas Workers' Compensation Act. In the final analysis, the issue presented for resolution is defendant's intent. The issue of defendant's motive and intent is not an issue appropriate for the court to decide and the court erroneously usurped the function of the jury.

Having survived summary judgment and directed verdict at the close of plaintiff's evidence and having presented substantial circumstantial evidence of retaliatory discharge, with the case only moments away from being decided by the jury, except in extreme circumstances, the role of the court in entering judgment as a matter of law is very narrow. In order for the court to enter judgement as a matter of law at the close of all evidence, the court is required to make a finding that no reasonable juror could find that defendant's motive in firing plaintiff was retaliatory. It is not the function of the court to assess and weigh the evidence to declare a victor. The function of the court is much more limited and when the court weighs the evidence, assesses credibility, and takes the case away from the jury, the practice usurps the function of the jury.

Under a constitutional jurisprudential system of law, plaintiff is entitled to trial by jury. Only on those occasions in which the evidence is so one sided that only but one conclusion can be reached by any reasonable individual, the court is entitled to enter

judgment as a matter of law. In his case, even a cursory review of the record in this case shows that there is substantial evidence from which a jury could find for Ms. Chaparro.

ELEMENTS OF CASE

In a retaliatory discharge case, a plaintiff needs to show that the employee was injured at work, the employer knew of the injury, the employee exercised statutory rights, adverse employment action and a causal connection between the adverse employment action and the exercise of statutory rights. *Huffman v. Ace Elect. Co. Inc.*, 883 F. Supp. 1469, 1475 (D. Kan. 1995); *Pilcher v. Board of Wyandotte County Commissioners*, 787 P.2d 1204, 1208 (Kan. Ct. App. 1990)

The facts in this case disclose that beginning on October 22, 1990, Ms. Chaparro developed a repetitive type of injury. She exercised statutory rights and hired an attorney on March 5, 1991. Shortly after her initial injury related complaints of October 22, 1990 Ms. Chaparro was charged with the first no call no show of October 29, 1990. The proximity in time between plaintiff's physical problems in this case and the adverse employment action is a beginning point in the analysis of a retaliatory discharge case.

Beginning on March 5, 1991 Ms. Chaparro's claim became litigated. Shortly after Ms. Chaparro's claim went into litigation, on May 13, 1991 she was fired after she had been sent home with

instructions not to return unless she had a doctor's release.

As the Court of Appeals noted in its decision on appendix page 8A, Ms. Chaparro presented evidence that Ms. Chaparro's supervisor and the nurse made derogatory comments about her, IBP has a practice of imposing arbitrary limits on the cost of workers' compensation benefits, the proximity in time between her exercise of statutory rights and defendant's adverse employment action against her and the fact that the charge of no call no show excuses for October 29, 1990 and May 11 and 13, 1991 appear pretextual.

Plaintiff agrees that the elements of retaliatory discharge contained in the court of appeals decision on appendix page 13A. Plaintiff also agrees that the question was whether the jury could find for Ms. Chaparro. In its decision, the court of appeals, just as the district court, found that "Ms. Chaparro failed to present clear and convincing evidence that IBP's termination decision was improperly motivated by her filing of a workers' compensation claim." Appdx. p. 15A. Plaintiff submits that it is not the function of the court to make a finding of whether plaintiff presented clear and convincing evidence of defendant's improper motive. That determination might be appropriate in a case in which a plaintiff is trying a case to the court. However, such determination is reserved for the jury in this case, and the district court as well as the court of appeals in deciding that plaintiff did not present clear and convincing evidence of

defendant's motive, usurped the function of the jury.

It is the job of the jury to look at the evidence and make the determination as to whether the evidence of defendant's motive was clear and convincing.

Plaintiff submits to this court of last resort, that the current trend by lower courts to weigh evidence and make a finding for the plaintiff prior to allowing a case to reach the jury is inappropriate and it violates plaintiff's right to trial by a jury.

In the court of appeals decision on appendix pages 15A-21A, the court reviews a synopsis of plaintiff's evidence and makes arguments against the same. However, striking is the fact that the court looks at each piece of evidence on an individual basis ruling that such evidence is not sufficient for a reasonable juror to find for plaintiff.

The panel undertook to evaluate each piece of evidence in isolation and to conclude that such evidence, standing alone, was not probative of retaliatory discharge. Plaintiff submits that in any case you can take the evidentiary record and conclude that each particular piece of evidence did not prove the whole claim, even in the best case ever. The court could dismiss any case as a matter of law by taking the position that each piece of evidence presented, alone, does not prove plaintiff's case. It would be impossible for a plaintiff to win a case if this type of analysis was proper. It is the

combination of various pieces of evidence that allows a party to prevail. In this case, plaintiff presented a vast amount of evidence of defendant's retaliatory practices, defendant's retaliatory motives, the methodology used to retaliate, direct evidence of retaliation and a great amount of circumstantial evidence of retaliation. Thus, her case should have been decided by the jury.

The court's failure to view the evidence in a cumulative fashion to determine whether a cumulative nature of such evidence may allow a reasonable juror to find for Ms. Chaparro.

Plaintiff submits that the district court and the court of appeals dismissal of substantial evidence presented by plaintiff and the arguments against such evidence are not appropriate functions of the court but are jury work.

There could have been no reason as to which the court should not have allowed this case to be decided by the jury. The jury was ready to commence deliberations and the practice of taking away cases from the jury particularly when there is such a substantial amount of evidence is clearly erroneous. In fact, as the court of appeals admits in its decision, plaintiff even presented direct evidence from witnesses that heard that Ms. Chaparro would be fired because of her injuries. To argue that the record does not reflect that individuals that made such comments had supervisory capacity over Ms. Chaparro stretches the function of the court far away from the proper

elasticity of the court's function. In fact, plaintiff presented evidence that Ms. Chaparro's supervisor specifically indicated that he was going to fire her because of her complaints related to her injury. Again, to argue that Ms. Chaparro's supervisor may not have had too much influence on the personnel department in Ms. Chaparro's firing, again stretches the elasticity of the court's discretion far beyond an appropriate point.

In this case, having presented evidence that the nurse and her own supervisor both made derogatory comments about impending adverse employment action against Ms. Chaparro as a result of her work related injuries is powerful compelling evidence of defendant's retaliatory motive.

Plaintiff also offered evidence of defendant's self-insured status and a number of ways in which defendant seeks to improperly save money by retaliating against injured employees.

Finally, Ms. Chaparro presented evidence of the proximity in time between her exercise of statutory rights and defendant's adverse employment action.

Plaintiff submits to the court that of paramount importance is the fact that defendant falsified its records with respect to the absences for which Ms. Chaparro was fired. An absence that was listed as excused was later changed and listed as unexcused. However, defendant's own records indicated that defendant was well aware that Ms. Chaparro was sick for

such absence and the same should have been excused.

Therefore, at the very least, there was a substantial factual dispute concerning Ms. Chaparro's termination of employment and the case should have been decided by the jury. Even the Court of Appeals indicates "while this evidence does indicate that there is a factual dispute as to whether Ms. Chaparro should have been assessed an excused absence on May 11, it does not demonstrate that IBP acted with retaliatory intent in dismissing her from employment." Appdx. p. 20A. The court misses the point. That important fact coupled with a number of other pieces of important evidence including testimony about the nurse and supervisor's comment of Mr. Chaparro's impending termination because of her injuries provides clear evidence from which a jury could have made a finding in favor of plaintiff.

2. Whether the court abused its discretion in excluding the testimony of Jennifer Dombkowski and Timothy Russell.

Plaintiff proposed these two witnesses to testify that supervisors at IBP are instructed to find ways to fire injured employees. The court excluded this evidence on the basis that the supervisors worked at the Emporia, Kansas facility rather than the Holcomb, Kansas facility where Ms. Chaparro worked.

Plaintiff submits to the court that defendant's practice of instructing its supervisors to fire injured employees,

even if it is at a different facility, presents important circumstantial evidence of defendant's retaliatory motive with respect to injured employees. Plaintiff submits that it was an abuse of discretion to exclude such evidence.

REASONS FOR GRANTING THE WRIT

This case illustrates a system that has run amuck of its purpose and objective. First, Kansas appears to be the only state that requires a plaintiff in a retaliatory discharge case to present proof of the elements of the case by clear and convincing evidence. Second, the onerous burden of proof required, coupled with a philosophical requirement by federal courts that plaintiff satisfy the court of proof by the applicable burden of proof in order to allow a jury to decide the case, results in a system that all but obliterates the cause of action and deprives plaintiffs of a constitutional right of trial by jury.

Plaintiff is cognizant that in a diversity claim, this court rarely grants a writ. However, the absence of a federal question should not eliminate plaintiff's right to trial by jury. Thus, plaintiff respectfully requests that the court afford her the same constitutional rights as it would a plaintiff presenting an important federal question.

Plaintiff submits that the decision of the court of appeals in this case, appears to have undertaken to advance a series of arguments to justify the decision by the District Court, rather

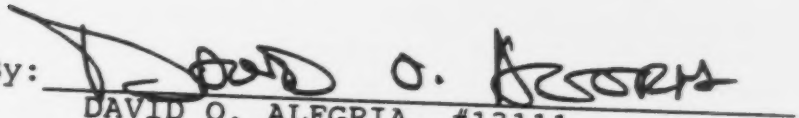
than attempting to employ applicable legal maxims designed to accomplish justice and to perform its review functions in an objective and critical matter regardless of the consequences. A plain review of the court of appeals decision shows an overwhelming amount of evidence presented by plaintiff that if it does not allow the case to reach the jury, it will be a rare plaintiff in this type of case that will be able to ever have trial by jury.

CONCLUSION

WHEREFORE, for the foregoing reasons plaintiff respectfully request that the court grant certiorari in this matter and reverse the court of appeals decision and send this matter for trial to be decided by a jury with instructions that Ms. Dombkowski and Mr. Russell be allowed to testify.

Respectfully submitted,

McCULLOUGH, WAREHEIM & LaBUNKER, P.A.

By: 

DAVID O. ALEGRIA, #13111
1507 S. W. Topeka Boulevard
P. O. Box 1453
Topeka, Kansas 66601-1453
(913) 233-2323
ATTORNEYS FOR AMANDA CHAPARRO
Petitioner

APPENDIX A - ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED DECEMBER 24, 1996

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

AMANDA CHAPARRO,

Plaintiff-Appellant
/Cross Appellee.

v.

Case Nos. 95-3078
95-3098

IBP, INC.,

Defendant-Appellee
/Cross Appellant,

STATE OF KANSAS, DEPARTMENT OF HUMAN RESOURCES,

Movant/Cross-Appellee.

ORDER AND JUDGMENT*

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before HENRY, MURPHY, and RONEY,** Circuit Judges.

In this retaliatory discharge case filed in diversity, plaintiff-appellant Amanda Chaparro appeals the district court's entry of judgment as a matter of law in favor of defendant-appellee IBP, Inc. ("IBP"). Ms. Chaparro argues that the district court erred in ruling that she did not meet the evidentiary burden necessary to support her claim that IBP terminated her employment in retaliation for exercising her rights under the Kansas Workers' Compensation Act. Ms. Chaparro also claims that the district court erred in excluding the testimony of two of their witnesses. IBP cross-appeals, arguing that the district court erred in excluding statements Ms. Chaparro made to the Kansas Department of Human Resources ("KDHR") in the course of applying for workers' compensation benefits. In response, Ms. Chaparro and KDHR argue that Ms. Chaparro's written and recorded statements to the KDHR are protected as confidential pursuant to Kan. Stat. Ann. § 44-714(f). We assert jurisdiction under 28 U.S.C. § 1291, and for the reasons stated below, affirm the district court's judgment.

I. BACKGROUND

A. Factual History

** Honorable Paul H. Roney, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

Ms. Chaparro worked at IBP's Finney County, Kansas meat packing and processing facility from May 8, 1989 until IBP terminated her employment on May 14, 1991 for allegedly violating its unexcused absences policy. On October 22. 1990, Ms. Chaparro began experiencing pain in her left arm while working on the job and reported this pain to the dispensary nurse, Juanita Meadows. After examining her, Nurse Meadows placed her in a special program for monitoring and treating work-related injuries and returned Ms. Chaparro to her regular job.

The first absence relevant to Ms. Chaparro's termination occurred on October 29, 1990. That day, she left work early to see her personal physician, Dr. Nonhof. Because her appointment ended after her shift, she did not return to work that day nor did she call in to report that she would not be returning. The next day, she returned to work with a doctor's excuse which stated that she had been under the doctor's care and would be unable to work until November 1, 1990. IBP assessed Ms. Chaparro an unexcused aabsence for failing to return to work or to call in after her appointment on October 29, 1990. Ms. Chaparro discussed the unexcused absence with her supervisor at the time, Steve Widler, but she did not seek administrative review of the decision to IBP's personnel director.

On November 1, 1990, after several visits to the dispensary, Nurse Meadows imposed restriction s on Ms. Chaparro's use of her left hand and placed her on a "light duty" paint crew job until November

26, 1990. On December 4, 1990, after being placed back in her former job trimming cow tails, Ms. Chaparro reported further problems with her left arm to the nurse. On December 7, 1990, at IBP's direction, Ms. Chaparro began medical treatment with Dr. Lauren Welch. Dr. Welch initially diagnosed Ms. Chaparro as suffering from carpal tunnel syndrome, but later changed this diagnosis to deQuervain's syndrome of the left wrist and tennis elbow. Due to her medical condition, Dr. Welch restricted Ms. Chaparro to work assignments in which she would not be required to use her left hand and continued to examined and treat Ms. Chaparro approximately every two weeks following the December 7, 1990 visit. In accordance with Dr. Welch's medical recommendations, IBP reassigned Ms. Chaparro to a number of light duty jobs including labeling, laundry room, clean-up, and lower rendering.

On March 5, 1991, Ms. Chaparro retained an attorney and filed a workers' compensation claim to recover for her work-related injuries. IBP received notification of the claim on March 8, 1991. In her claim, Ms. Chaparro sought compensation for temporary total disability benefits along with job accommodation and a vocational rehabilitation evaluation.

Following a medical examination on May 1, 1991, Dr. Welch revised Ms. Chaparro's medical restrictions to allow the limited use of her left hand while not lifting more than ten pounds. The new dispensary nurse, Rhonda Shipley, then

assigned Ms. Chaparro to wrapping rounds, which consists of using both hands to tear off a sheet of plastic wrap and place it on exposed carcasses or "rounds." On May 6, 1991, Ms. Chaparro informed Nurse Shipley, that because of her injury, she was having difficulty wrapping rounds because it entailed using both of her hands and raising her arm above her shoulder. At Ms. Chaparro's urging, on May 9, 1991, Nurse Shipley called Dr. Welch who, based upon Nurse Shipley's description, ascertained that the job description fell within Ms. Chaparro's medical restrictions. Ms. Chaparro visited Dr. Welch that same day, at which time Dr. Welch concluded that, while Ms. Chaparro's description of the job differed from that of Nurse Shipley's, the job fell within her medical restrictions.

On May 10, 1991, Ms. Chaparro complained to Nurse Shipley of fever, nausea, achiness, dizziness, and vomiting. Nurse Shipley instructed Ms. Chaparro to see her personal physician and to obtain a release from her physician prior to returning to work. Nurse Shipley also instructed Ms. Chaparro to call in every day that she would be unable to work at least 30 minutes prior to her shift. Ms. Chaparro testified that she told Nurse Shipley that she did not have a phone and the nearest one to which she had access was two to three blocks away. Ms. Chaparro then went to see Dr. Nonhof, but was unable to get an appointment until Monday, May 13, 1991. Ms. Chaparro testified that, after making her appointment, she returned to IBP and told Nurse Shipley about the appointment. She

also testified that she telephoned the personnel office on May 11, 1991 at approximately 6:00 a.m. and left a message on the office's answering machine stating that: "I wouldn't be able to make it in because I couldn't get a doctor's excuse. I couldn't get to see the doctor until the 13th." Trial record, at 157. On May 14, 1991, Ms. Chaparro returned to work with a medical release.

That same day, her supervisor, Dennis Jones, informed her of the decision of the personnel manager, Rick Nimrick, to terminate her from employment based on two personnel office"employee action reports" which documented that she had unexcused absences for May 11 and 13, 1991, and had failed to notify the personnel office that she would be absent. These two absences, in addition to her October 29, 1990 absence, violated IBP's three unexcused absences policy.[1] Ms. Chaparro appealed

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[1] IBP's "Unexcused Absence and Tardy Policy" provides that an employee will be terminated from employment for receiving three unexcused absences. The policy defines an "unexcused absence" as:

(1) any absence where an employee fails to notify the company at least thirty (30) minutes prior to his starting time;

(2) any absence from which an employee cannot satisfactorily provide a justifiable reason for absence;

(3) any absence for personal reasons if the employee does not get prior approval for taking time off from his supervisor (emergencies and unusual

her termination to Mr. Nimrick, stating that she had called in and left a message on the answering machine on May 11, 1991. Mr. Nimrick testified at trial from his notes that Ms. Chaparro had said that she thought she did not need to call in for the two days she missed since she was sent home by the nurse. Mr. Nimrick stated that he did not recall Ms. Chaparro saying that she had called in and that, if she had, he would have mentioned it in his notes and checked the answering machine to verify whether or not she had left a message. Because the company keeps the tapes for approximately two months, the tape was not available at trial. Mr. Nimrick declined to excuse her absences and terminated her employment based upon her three unexcused absences.

B. Procedural History

On May 14, 1993, Ms. Chaparro filed the present action claiming that IBP terminated her employment in retaliation for her filing of a claim under the Kansas Workers' Compensation Act. At trial, Ms. Chaparro presented testimony by five witnesses relevant to this appeal: Martha Arteaga, a co-worker; Minh Doung, the present personnel manager at the IBP's Finney County facility; Doug Bolton, the present complex personnel manager at IBP's Finney County facility; Gary Korte, a former IBP in-house attorney; and Ms. Chaparro herself. The district court

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circumstances will be reviewed by your supervisor and the Personnel department) . . . . Aple's App., Vol. I at 79.

excluded the testimony of Jennifer Dombkowski and Tim Russell, supervisors at other IBP facilities, who Ms. Chaparro sought to have testify regarding IBP's employment practices.

Through her witnesses, Ms. Chaparro sought to establish several facts that, taken together, would establish a causal connection between her filing of a workers' compensation claim and IBP's termination of her employment. These included: (1) derogatory comments made about her by her supervisor and the former nurse; (2) IBP's policies which sought to limit workers' compensation costs to the company; (3) the proximity in time between her filing of her workers' compensation claim and the events leading to her termination; and (4) IBP's use of the three unexcused absences policy as a pretext for retaliating against her because she believes IBP unfairly assessed all three absences against her. At the close of Ms. Chaparro's case, IBP moved for judgment as a matter of law. The court denied IBP's motion.

IBP then called four witnesses: Dr. Lauren Welsh, Rhonda Shipley, Dennis Jones, and Rick Nimrick. Dr. Welsh and Nurse Shipley documented Ms. Chaparro's injuries and subsequent treatment, and Mr. Bolton and Mr. Nimrick explained IBP's personnel policies and Ms. Chaparro's termination. IBP also sought to subpoena documents from the KDHR concerning written and oral statements made by Ms. Chaparro to the KDHR in connection with her application for workers' compensation benefits. The district court, on the

motion of KDHR, excluded this evidence on the basis that it was protected as privileged and confidential pursuant to Kan. Stat. Ann § 44-714(f). At the close of all the evidence in the case, IBP renewed its motion for judgment as a matter of law. The district court granted IBP's motion and this appeal followed.

II. DISCUSSION

Ms. Chaparro challenges the district court's grant of IBP's motion for judgment as a matter of law on the basis that she produced sufficient evidence to support a finding by a reasonable jury that IBP acted with retaliatory intent in dismissing her from employment.[2] Ms.

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[2] Ms. Chaparro also challenges the district court's grant of IBP's motion for judgment as a matter of law on the basis that it denied her of her Seventh Amendment right to a trial by jury. Insufficiency of the evidence was one of the common law grounds existing prior to the adoption of the Seventh Amendment in 1791 which allowed a trial judge to direct a verdict in a case. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 250 (1940). It is well established that this procedure, from which the present Fed. R. Civ. P. 50 is derived, does not violate the Seventh Amendment. Galloway v. United States, 319 U.S. 372, 389-92 (1943); see United States v. Hess, 341 F.2d 444, 448 (10th Cir. 1965). On this basis, we consider Ms. Chaparro's Seventh Amendment claim as subsumed within her challenge to the district court's grant of judgment as

Chaparro also challenges the district court's exclusion of the testimony of Jennifer Dombkowski and Tim Russell as an abuse of discretion. IBP cross appeals, asserting that the district court erred in quashing its subpoena duces tecum on the KDHR as privileged and confidential information pursuant to Kansas statute. The KDHR responds as cross-appellee that Kan. Stat. Ann § 44-714(f) protects from disclosure information and documents it generates related to the filing of workers' compensation claims.

Because we uphold the district court's grant of IBP's motion for judgment as a matter of law, we decline to consider whether Kan. Stat. Ann. §44-714(f) protects the KDHR from disclosing information it generates concerning workers' compensation claimants. Therefore, we limit our consideration to the following issues on this appeal: (1) did the district court err in granting IBP's motion for judgment as a matter of law on Ms. Chaparro's retaliatory discharge claim; and (2) did the district court abuse it s discretion in excluding the testimony of plaintiff's witnesses who would testify regarding employment conditions at another of IBP's facilities?

A. Motion for Judgment as a Matter of Law

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a matter of law for IBP and the question of whether there was a "legally sufficient evidentiary basis for a reasonable jury" to find in her favor. Fed. R. Civ. P. 50(a)(1).

We review the grant of a Fed. R. Civ. P. 50(a) motion for judgment as a matter of law de novo, applying the same legal standards as did the district court. Clark v. Brien, 59 F.3d 1082, 1086 (10th Cir. 1995); Thompson v. State Farm Fire & Cas. Co., 34 F.3d 932, 941 (10th Cir. 1994). In conducting this review, we must determine whether, viewing the evidence in the light most favorably to the non-moving party, the inferences to be drawn from the evidence are so clear that reasonable minds could not differ as to the conclusion. McKenzie v. Renberg's Inc., 94 F.3d 1478,1483 (10th Cir. 1996), Rajala v. Allied Corp., 919 F.2d 610, 615 (10th Cir. 1990). In a diversity case such as this one, "we examine the evidence in terms of the underlying burden of proof as dictated by state law." Vasey v. Martin Marietta Corp., 29 F. 3d 1460, 1464 (10th Cir. 1994).

1. The Kansas Burden of Proof

In Kansas, the employer-employee relationship is governed by the employment-at-will doctrine. The doctrine holds that, in the absence of an express or implied agreement to the contrary, the employment is terminable at the will of either party. Johnson v. National Beef Packing Co., 551 P.2d 779, 781 (Kan. 1976). An exception to this general rule exists if an employee is dismissed in retaliation for exercising his or her rights under the Kansas Workers' Compensation Act. Murphy v. City of Topeka, 630 P.2d 186, 192 (Kan. Ct. App. 1981); Ortega v IBP, 874 P.2d 186, 192

(Kan. Ct. App. 1981); *Ortega v. IBP, inc.*, 255 Kan. 874 P.2d 1188, 119 (Kan. 1994).

In Ortega, the Kansas Supreme Court set out the evidentiary standard for evaluating a retaliatory discharge claim in Kansas. The court there provided: "A party having the burden of proving a discharge from employment in retaliation for having filed a workers' compensation claim must be clear and convincing in nature." 874 P.2d at 1198. In defining this somewhat unique, hybrid standard, the court explained that the "preponderance of the evidence standard" requires "evidence which shows a fact is more probably true than not true." Id. at 1197. The court stated that evidence is "clear if it is certain, ambiguous, and plain to the understanding"; and "it is convincing if it is reasonable and persuasive enough to cause the trier of facts to believe it." Id. at 1198 (citing Chandler v. Central Oil Corp., 853 P.2d 649, 655 (Kan. 1993)). For the evidence to be "clear and convincing":

> [T]he witnesses to a fact must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the details in connection with the transaction must be narrated exactly and in order; the testimony must be clear, direct and weight; and the witnesses must be lacking in confusion as to the facts at issue.

Modern Air Conditioning, Inc. v. Cinderella Homes, Inc., 596 P.2d 816,824 (Kan. 1979)(citations omitted).

2. Elements of Retaliatory Discharge in Kansas

To establish a prima facie case of retaliatory discharge under Kansas law, a plaintiff must produce evidence demonstrating: (1) that the plaintiff filed a claim for workers' compensation benefits or sustained an injury for which he or she might assert a future claim for such benefits; (2) that the employer had knowledge of the plaintiff's compensation claim or the fact that the plaintiff had sustained a work-related injury for which he or she might file a future claim for benefits; (3) that the employer terminated the plaintiff's employment; and (4) that a causal connection existed between the protected activity or injury, and the termination. Huffman v. Ace Elect. Co. Inc., 883 F. Supp. 1469, 1475 (D. Kan. 1995); Pilcher v. Board of Wyandotte County Commissioners, 787 P.2d 1204, 1208 (Kan. Ct. App. 1990). Ultimately, the plaintiff can recovery only upon proving that the discharge was "based on" the employer's intent to retaliate.[3] See

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[3] The federal district courts in Kansas have applied the United States Supreme Court's burden shifting approach established in McDonnell Douglas Corp. v. Green. 411 U.S. 792 (1973), for analyzing state retaliatory discharge claims. See Huffman, 883 F. Supp at 1475; accord Robinson v. Wilson Concrete Co., 913 f.

Brown v. United Methodist Homes for the Aged, 815 P.2d 72, 88 (Kan. 1991).

Supp. 1476, 1483 (D. Kan. 1996), Rosas v. IBP, Inc., 869 F. Supp. 912,916 n. 1 (D. Kan. 1994). Under the burden shifting approach, once the plaintiff establishes a prima facie case, the burden of production shifts to the defendant to rebut the inference that its motives were retaliatory by articulating a legitimate, non-retaliatory motive for the termination. If the defendant carries this burden of production, thereby refuting the plaintiff's prima facie case, the burden then shifts back to the plaintiff to prove by a preponderance of the evidence, which is clear and convincing in nature, that the defendant acted with the retaliatory intent. Rosas, 869 F. Supp. at 916.

While the Kansas courts have never specifically held that this burden shifting approach applies in the context of retaliatory discharge cases, the Kansas Supreme Court in Ortega discussed its application in employment discrimination and public employee discharge cases within the context of elaborating the standard for analyzing retaliatory discharge claims. 874 P.2d 1188, 1196-97. We agree with the federal district courts that Kansas courts would presumptively apply the McDonnell Douglas burden shifting approach in retaliatory discharge cases. However, because we hold that Ms. Chaparro has not established a prima facie case for retaliatory discharge under Kansas law, we do not analyze her claim in the context of this burden shifting approach.

The central issue on this appeal is whether Ms. Chaparro met the fourth element of her prima facie case. That is, whether, at the close of all of the evidence in the case, there was "clear and convincing" evidence by which a reasonable juror could find "it more probable than not" that IBP based its decision to terminate Ms. Chaparro on her filing of a workers' compensation claim. Regardless of whether there is a factual dispute as to whether Ms. Chaparro should have been terminated for the tree unexcused absences assessed against her, we conclude that Ms. Chaparro failed to present clear and convincing evidence that IBP's termination decision was improperly motivated by her filing of a workers' compensation claim.

3. Ms. Chaparro's Evidence

Our task on appeal is to review Ms. Chaparro's evidence to determine if it provides the "preponderance of evidence which is clear and convincing" as required by Kansas law. First, Ms. Chaparro introduced evidence alleging that IBP employees made derogatory statements about her and sought to terminate her from employment after she reported and began receiving treatment for her injuries. Martha Arteaga, an IBP employee who worked with Ms. Chaparro, testified that she overheard former IBP nurse Juanita Meadows refer to Ms. Chaparro as a "lazy bitch" and that she observed Nurse Meadows mistreating Ms. Chaparro in her work assignments following Ms. Chaparro's accident. The difficulty in utilizing this testimony to show retaliatory intent is that Ms. Chaparro offered no evidence

to demonstrate that Nurse Meadows had a supervisory capacity at IBP or had any influence regarding Ms. Chaparro's termination. Most significantly, it is undisputed that Nurse Meadows left her dispensary job in March 1991, two months prior to Ms. Chaparro's termination.

Ms. Arteaga also testified that she overheard Dennis Jones, Ms. Chaparro's work supervisor, discussing Ms. Chaparro with another IBP employee in which she stated: "they was saying, oh, I'm going to fire her ass you know, because she's complaining too much." Trial record, at 15. After being asked whether there was any question that she heard Mr. Jones say that he was going to fire Ms. Chaparro, Ms. Arteaga responded: "No. He just say that she was making trouble." Id. While this evidence might provide some--although far from "clear and convincing"--evidence of retaliatory intent, there is a problem in linking these comments directly with IBP's decision to terminate Ms. Chaparro's employment. The testimony of Mr. Jones and the personnel director, Rick Nimrick, indicates that Mr. Jones had no influence over whether or not to terminate an employee for absences. The decision to discharge employees for unexcused absences is generated by Mr. Nimrick in the personnel department and only sent to the supervisor to relay the decision to the employee. The only input of the supervisor regarding absences, according to Messrs. Jones and Nimrick, is to relay information to the personnel office concerning employee absences. Without any such connection to her dismissal from employment, we find that

this evidence provides no support for determining whether IBP acted with retaliatory intent in discharging Ms. Chaparro.

Second, Ms. Chaparro offers evidence regarding IBP's efforts to reduce workers' compensation costs in seeking to prove that there is a corporate policy to retaliate against employees who file workers' compensation claims. Gary Korte, a former IBP corporate attorney, testified that IBP is self-insured for workers' compensation benefits, that the company offers prizes for employees to promote workplace safety, that the company disseminated information to discourage the hiring of attorneys in bringing workers' compensation claims, and that the company has an annual goal for workers' compensation of $350.00 per employee. This evidence, however, even if it demonstrates and attempt by the company to discourage workers' compensation claims, does nothing to support a claim that the company retaliated against employees once such claims were filed. Indeed, many large businesses make such efforts and understandably so. Furthermore, Mr. Korte stated on cross-examination that he believed that it actually costs the company more money when they terminated an employee because it increased the average weekly wage and could trigger vocational retraining which would increase the cost of providing workers' compensation benefits.

Third, Ms. Chaparro asserts that the proximity in time between the filing of her workers' compensation claim and

termination from IBP is indicative of retaliatory intent. IBP received notice of Ms. Chaparro's claim on March 8, 1991 and dismissed her from employment on May 14, 1991--a period of 2 months. We recognize that close proximity in time may provide some probative evidence of retaliatory intent. In Robinson v. Wilson Concrete Co., 913 F. Supp. 1476 (D. Kan. 1996), for instance, in reviewing retaliatory discharge cases in Kansas, the district court stated that while proximity in time can provide some evidence of retaliatory motive, it alone is "insufficient to show by evidence of a clear and convincing nature that defendant's proffered nonretaliatory explanation for plaintiff's termination . . . was pretextual." Id. at 1484-85. However, such evidence coupled with other, more probative evidence, will provide support for a retaliatory discharge claim. Id. at 1484-85.

Finally, Ms. Chaparro focuses most of her attention on rebutting IBP's proffered reason for dismissing her--the neutral unexcused absences policy--which she claims IBP used merely as a pretext for retaliation. As discussed above, Ms. Chaparro testified (1) that she had spoken with Nurse Shipley on May 10, 1991, informing her that she would be unable to see a doctor until May 14; (2) that she had called in from a neighbor's phone on May 11 and left a recorded message with IBP's personnel office; and (3) that she returned to work on May 14 with a doctor's excuse.

Ms. Chaparro introduced IBP's employment calendar into evidence to support her contention that she had called in that day. IBP's attendance calendar for Ms. Chaparro shows that the number "12"--the code for an excused absence--had originally been written down for May 11, 1991. Written over the "12" is an "11"--the code for an unexcused absence. In addition, on the back of the calendar where the explanation for absences are contained, is written "sick" for May 11. At trial, neither party offered any clear evidence as to who made the change or why it was made, other than IBP's suggestion that it was a clerical error.

IBP's written policy and testimony by IBP personnel supervisors Messrs. Doung and Nimrick provide that an employee is required to inform the company prior to each day he or she will be absent. Trial record, at 29, 34, 385-86. Ms. Chaparro also acknowledged in her testimony that Nurse Shipley had instructed her to call in every day that she would be absent when she left IBP on May 10, 1991 to see her family physician. Id. at 216. Ms. Chaparro does not contend that she called in on October 29--the two other days for which IBP cited her unexcused absences. Furthermore, there is no evidence in the record that returning with a doctor's excuse after an unexcused absence will excuse that absence. Thus, the only issue remaining to this argument is whether Ms. Chaparro called in on May 11, and whether the calendar change supports her testimony.

While this evidence does indicate that there is a factual dispute as to whether Ms. Chaparro should have been assessed an unexcused absence on May 11, it does not demonstrate that IBP acted with retaliatory intent in dismissing her from employment. As Kansas law recognizes, and employer may terminate an employee pursuant to a neutral attendance policy--even where the employee is injured and the employer cannot provide suitable work. Raymond v. Archer Daniels Midland, Co., 762 F. Supp. 901, 904-5 (D. Kan. 1991). Aside from insinuating conspiratorial action on the part of IBP's personnel office, Ms. Chaparro does not provide any evidence to support her contention that the personnel office acted with retaliatory intent in citing her an unexcused absence on May 11. The personnel director's notes of his conversation with Ms. Chaparro on May 14 do not indicate that Ms. Chaparro made any claim that she had telephoned IBP. More significantly, on cross-examination, Ms. Chaparro's testimony seemed unclear as to whether she called in when sh stated: "I explained to [Mr. Nimrick] that is did not have a phone at that time. And I couldn't get to a phone. I couldn't possibly disturb my neighbor at six, five o'clock in the morning to use her phone. That's what I had told Mr. Nimrick." Trial record, at 224-25. On balance, the evidence offered by Ms. Chaparro on this issue does not meet the "clear and convincing" standard required by the Kansas courts to demonstrate retaliatory intent.

The foregoing evidence offers no proof that IBP terminate Ms. Chaparro for filing a workers' compensation claim. The evidence presented by Ms. Chaparro falls short of evidence of retaliatory intent that is "certain, unambiguous, and plain to the understanding" or "reasonable and persuasive enough to cause the trier of facts to believe" that defendant terminated plaintiff "based on" her filing of a workers' compensation claim. See Ortega, 874 P.2d at 1198; Brown, 815 P.2d at 88. No evidence exists to show that an excused absence was later altered because anyone at IBP desired to retaliate against Ms. Chaparro for filing a workers' compensation claim. Admittedly, this evidence would be difficult to obtain. But it is Kansas law which sets this extremely high hurdle and it is Ms. Chaparro's responsibility to offer more than just speculation to meet her evidentiary burden of proof. In sum, we agree with the district court that a reasonable jury could not find, based on a preponderance of evidence which is clear and convincing, that IBP terminated Ms. Chaparro based on her filing of a workers' compensation claim. After carefully considering all the evidence presented at the trial, we find that IBP is entitled to judgment as a matter of law on Ms. Chaparro's retaliatory discharge claim.

B. The testimony of Ms. Dombkowski and Mr. Russell

Where a trial court excludes evidence and the offering party properly objects at trial, we will reverse the court's decision only if the exclusion of the

evidence constitutes an abuse of discretion that results in "manifest injustice to the parties." Thompson, 34 F.3d at 939 (citing Angelo v. Armstrong World Indus. Inc., 11 F.3d 957, 960 (10th Cir. 1993)). The district court is given broad discretion in deciding evidentiary matters. Gilbert v. Cosco, Inc., 989 F.2d 399, 402 (10th Cir. 1993). Under the abuse of discretion standard, "a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." Pandit v. American Honda Motor Co., Inc., 82 F.3d 376, 379 (10th Cir. 1996).

Ms. Chaparro appeals the district court's decision to exclude the testimony of Jennifer Dombkowski and Tim Russell. Ms. Dombkowski and Mr. Russell are both former supervisors at IBP's Emporia, Kansas facility. Ms. Chaparro sought to offer their testimony regarding specific events and conversations at IBP's Emporia facility to demonstrate that "supervisors ar instructed to fire injured employees" and that they "are asked to find pretest to fire injured employees." Aplt's Br., at 39. According to Ms. Chaparro, such testimony would have allowed her to present to the jury " the whole rational [sic] for which plaintiff was terminated" by providing direct evidence of IBP's state of mind. Id. at 41-42.

The district court excluded the testimony based on three independent grounds: (1) that the evidence was not

relevant under Fed. R. Evid. 491 in that it had no tendency to prove any ultimate facts at issue in the case; (2) that Ms. Chaparro failed to demonstrate pursuant to Fed R. Evid. 104(b) a necessary condition of fact, that is, that what allegedly occurred at the Emporia facility had anything to do with events at the Finney County facility; and (3) that even if it were relevant, the probative value of the proffered testimony was substantially outweighed by the danger of confusion of the issues in the case under Fed. R. Evid. 403. Trial record, at 183-85.

We find no abuse of discretion in the district court's ruling to exclude the testimony of both witnesses. While the testimony of other employees as to their treatment by an employer is relevant in assessing an employer's retaliatory intent, a plaintiff must demonstrate that the circumstances involving the other employees ar such that their statements can "logically or reasonably be tied to the decision to terminate [the plaintiff]." Spulak v. K Mart Corp., 894 F. 2d 1150, 1156 n.2 (10th Cir. 1990). In this instance, the events to which both Ms. Dombkowski and Mr. Russell would have testified occurred after Ms. Chaparro's termination from employment at the Finney County facility on May 14, 1991. Specifically, Ms. Dombkowski sought to testify regarding conversations with her immediate supervisor at the Emporia facility which occurred between October 1992 and July 1993. Though Ms. Chaparro did not offer the substance of Mr. Russell's testimony into evidence, the district court concluded that his

testimony would be excluded on the same basis as Ms. Dombkowski's testimony. Trial record, at 188. Ms. Chaparro also failed to establish any similarity in the employment situations of the two facilities, that either witness knew anyone or anything about personnel decisions at the Finney County facility, or that their testimony would provide evidence of a company-wide policy of retaliation against employees who file workers' compensation claims. See Trial record, at 180-85.

On this basis, the proffered testimony did not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Such evidence, if introduced, could also lead to confusion of the issues by members of the jury which Fed. R. Evid. 403 seeks to prohibit. Thus, we find that the district court did not abuse its discretion in excluding the testimony of Ms. Dombkowski and Mr. Russell.

III. CONCLUSION

For the reasons discussed fully above, that is, that Ms. Chaparro failed to establish a prima facie case for retaliatory discharge pursuant to Kansas law and that the district court did not abuse its discretion in excluding the testimony of Ms. Dombkowski and Mr. Russell, we AFFIRM the judgment of the district court. We need not reach the cross-appeal issue of whether Kan. Stat.

Ann. §44-714(f) protects the KDHR from disclosing information related to workers' compensation claimants.

The mandate shall issue forthwith.

Entered for the Court,

Robert H. Henry
Circuit Judge

APPENDIX B - ENTRY OF JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS FILED FEBRUARY 10, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

AMANDA CHAPARRO,)
Plaintiff,)
) CIVIL ACTION
vs.) No. 93-2200-GTV
)
IBP, INC.,)
Defendant.)
)

ENTRY OF JUDGMENT

Trial in this case was held on February 6-9, 1995. At the close of all evidence, defendant moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a). For the reason stated on the record, the court grants defendant's motion and enters judgment in favor of defendant, with defendant to recover its costs.

Copies of this order shall be mailed dot counsel of record for the parties.

IT IS SO ORDERED.

Dated at Kansas City, Kansas this 10 day of February, 1995.

G. T. VAN BEBBER
United State District Judge

APPENDIX C - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED FEBRUARY 11, 1997

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMANDA CHAPARRO,

Plaintiff-Appellant,

v.

Nos. 95-3078
95-3098

IBP, INC.,

Defendant-Appellee,

STATE OF KANSAS, DEPARTMENT OF HUMAN RESOURCES,

Movant-Appellee.

ORDER

Filed February 11, 1997

Before **HENRY**, Circuit Judge, **RONEY**,* Senior Circuit Judge, and **MURPHY**, Circuit Judge.

---

*Honorable Paul H. Roney, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

The appellant's motion to file the petition for rehearing out of time is granted. The request to sanction contained in appellee's response is denied.

The appellant's petition for rehearing is denied by the panel that rendered the decision. The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER, Clerk of the Court
by: L. Balzano
Deputy Clerk

Supreme Court, U.S.
FILED
JUN 4 1997
OFFICE OF THE CLERK

(2)

No. 96-1828

In The

Supreme Court of the United States

October Term, 1996

AMANDA CHAPARRO,

Petitioner,

vs.

IBP, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

*JOHN JURCYK, JR.
DOUGLAS M. GREENWALD
McANANY, VAN CLEAVE & PHILLIPS, P.A.
707 Minnesota Avenue, Suite 400
P.O. Box 171300
Kansas City, Kansas 66117
(913) 371-3838
(913) 371-4722 – Facsimile
Counsel for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court's holding that Defendant was entitled to judgment as a matter of law in a state law cause of action for retaliatory discharge due to insufficient evidence of a causal connection between the filing of a workers' compensation claim and discharge from employment implicates any federal constitutional rights.

2. Whether the district court's exercise of discretion to exclude testimony of two former employees of Defendant raises any important question of federal law.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, respondent IBP, inc. states that the only interested persons in this proceeding are those persons listed as parties to this proceeding and their attorneys.

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BRIEF IN OPPOSITION

Respondent, IBP, inc., respectfully requests that this Court deny the Petition for Writ of Certiorari which seeks review of the December 24, 1996, Order and Judgment of the United States Court of Appeals for the Tenth Circuit.

STATEMENT OF THE CASE

This civil action was one for retaliatory discharge brought under Kansas state law in which Plaintiff alleged that she was discharged from her employment with Defendant/Respondent on May 14, 1991, in retaliation for having earlier filed a workers' compensation claim. Subject matter jurisdiction in the United States District Court for the District of Kansas was premised solely on diversity of citizenship between the parties.

After the presentation of all of the evidence at trial held between February 6 and 9, 1995, Defendant renewed its F.R.Civ. P. 50(a) motion for judgment as a matter of law. The district court granted that motion on the ground that "there is no legally sufficient basis for a reasonable jury to find for the plaintiff on the issue of retaliation" in light of the applicable evidentiary standard of proof – preponderance of the evidence that is clear and convincing in nature. (Trial transcript, pp. 430, 442). The Tenth Circuit Court of Appeals unanimously affirmed.

Plaintiff was employed on the production line on the slaughter side of Defendant's Finney County (Garden City), Kansas facility from May 8, 1989, until May 14,

1991. Plaintiff alleges that during 1990 she began suffering from left hand pain which she reported to dispensary personnel on October 22, 1990. She commenced medical treatment on December 7, 1990, and she filed a formal workers' compensation claim in February 1991. (Trial transcript, pp. 145, 147, 203, 227, 336). Defendant's dispensary placed Plaintiff in a cumulative trauma disorder program in October 1990, which included monitoring of her health and sending her to a physician, Dr. Welch, for follow-up examinations. (Trial transcript, pp. 304, 335-337). Plaintiff testified that she was never denied access to the dispensary or to Dr. Welch. (Trial transcript, pp. 148, 204).

Pursuant to medical restrictions accommodated by Defendant, Plaintiff was assigned light duty work for most of the time period from December 7, 1990, to May 2, 1991, which she testified she could perform. (Trial transcript, pp. 148, 208-212, 305, 344-345). Because Plaintiff's only complaint on May 1, 1991, was a little pain in her thumb if she worked very hard with it, Dr. Welch determined that she now could lift and carry up to ten pounds, bend and stoop, reach above her shoulder, and use her left hand at work. (Trial transcript, pp. 305-306, 320-321). Dispensary nurse Rhonda Shipley reviewed the modified restrictions and then assigned Plaintiff the position of wrapping or hanging plastic on rounds, which consists of placing plastic wrap on the round part of carcasses. (Trial transcript, pp. 212, 345-346).

Although Plaintiff now concedes she physically was able to perform this job, she nonetheless complained about this assignment. (Trial transcript, pp. 150-151). Shipley telephoned Dr. Welch to verify whether it was

within Plaintiff's physical restrictions. She described the job duties, and Dr. Welch advised that he believed Plaintiff could perform the job. (Trial transcript, pp. 307-308, 347-348). On May 9, 1991, Shipley relayed this medical opinion to Plaintiff. After urging her to consult with Dr. Welch, dispensary personnel scheduled an appointment with him for later that day at Plaintiff's request. Plaintiff saw Dr. Welch alone at his office, and after she described, from her own perspective, the plastic on rounds job, Dr. Welch again advised that she could perform that job. (Trial transcript, pp. 152, 213-214, 310-311, 348). Dr. Welch testified at trial that he remained of the opinion that Plaintiff "should have been able to do that job without any difficulties." (Trial transcript, pp. 309, 311).

On May 10, 1991, Plaintiff returned to work, but later that day, she complained of flu-like symptoms and went home early. (Trial transcript, pp. 153-154, 215, 348-349).

At its Finney County facility, Defendant's attendance policy is reviewed with new employees, including Plaintiff, as part of orientation. (Trial transcript, pp. 198-200, 252-253). The policy provides that three unexcused absences within a twelve-month period, also referred to as no call/no show absences, are grounds for termination. (Trial transcript, p. 30, and Defendant's exhibit 405, Aplee.Supp.App. at 79). If an employee is ill, she must call in, no later than a half hour before the beginning of her shift, to a recorded number located in the personnel office, to let management know she is unable to work. A no call/no show unexcused absence occurs when the employee neither shows up for work nor calls in before her shift is to begin to report that she will not be at work

that day. (Trial transcript, pp. 373, 385-386, and Defendant's exhibit 405, Aplee.Supp.App. at 79). It is insufficient to return to work after several days of illness with a doctor's note indicating that the employee had been ill the entire period of the absence. Defendant must be informed ahead of time of any future absences due to sickness or any other reason. (Trial transcript, pp. 29-30, 33-34, 373, 414).

During her last twelve months of employment, Plaintiff was assessed three unexcused absences. The first was assessed on October 30, 1990, for an absence on October 29, 1990, when Plaintiff was permitted to leave early because of illness but failed to call in or come back to work that day. (Trial transcript, p. 253, and exhibit 401M, Aplee.Supp.App. at 71).

Plaintiff's second and third unexcused absences, which resulted in discharge from employment, occurred on May 11 and May 13, 1991. On May 10, 1991, Plaintiff was sent home early after complaining of nausea and flu symptoms, with instructions to obtain a full release to return to work from her personal physician. (Trial transcript, p. 349). Plaintiff admitted that Shipley instructed her to call in sick every day that she would be off work in addition to obtaining a doctor's release before returning to work. (Trial transcript, pp. 154, 215-216, 349-350).

Although Plaintiff testified that she telephoned Defendant on the morning of May 11, 1991, and reported that she was unable to work that day due to illness, Defendant has no record of this. (Trial transcript, pp. 155-157). Plaintiff testified that she did not call in on May 13, 1991. (Trial transcript, pp. 157-158, 161, 218-219).

On Tuesday, May 14, 1991, Plaintiff returned to work in the plastic on rounds job after giving a written medical release to the dispensary. (Trial transcript, pp. 159, 351-352). Based on the no call/no show absences on May 11 and May 13, 1991, personnel clerks prepared employee action forms which indicated that Plaintiff had been assessed her second and third unexcused absences.

Personnel director Rick Nimrick reviewed and signed the employee action reports and forwarded them to Plaintiff's immediate supervisor, Dennis Jones. Because Plaintiff had three unexcused absences within the past year, Jones advised her that she would be discharged and that she could appeal the decision directly to Nimrick. (Trial transcript, pp. 159-160). Plaintiff met with Nimrick on May 14, 1991. (Trial transcript, pp. 160, 397). She admitted to him that Shipley had told her, before going home ill, that she was required to call in every day that she was absent, and that she had not called in on either May 11 or May 13, 1991. Therefore, Plaintiff was discharged solely because of her three unexcused absences. Nimrick testified that had Plaintiff claimed to have called in on May 11, 1991, he would have had the recorder tape checked to determine whether she had done so. (Trial transcript, pp. 398-401 and Defendant's exhibit 401Q, Aplee.Supp.App. at 73).

Plaintiff alleged at trial that the stated reason for her discharge was pretextual and that Defendant had acted in retaliation for her having filed a workers' compensation claim. Plaintiff attempted to imply that Defendant had a financial incentive to discharge employees with pending workers' compensation claims. Gary Korte, a former in-house attorney for Defendant who defended workers'

compensation claims, testified to the contrary, stating that firing an employee with a pending workers' compensation claim "would usually end up costing more money" to the company. (Trial transcript, pp. 98-100, 135). Furthermore, Nimrick was not involved in workers' compensation claims. (Trial transcript, p. 401).

Plaintiff attempted unsuccessfully to admit into evidence the testimony of Jennifer Dombkowski and Tim Russell. During a preliminary voir dire examination, Dombkowski testified that she never worked at Defendant's Finney County, Kansas facility, had no knowledge of anything that transpired at that facility, that the comments she claimed to have heard at the Emporia, Kansas, facility occurred between October 1992 and July 1993 (more than one year after Plaintiff was discharged from the Finney County plant), that the alleged comments were made by Bob Wallace, an Emporia supervisor, and that she did not know Plaintiff, Nimrick, Dennis Jones, or any nurses working at the Finney County plant. (Trial testimony, pp. 173-176). The district court properly excluded Dombkowski's proposed testimony as not tending to prove any fact in issue. The conversation that Dombkowski proposed to testify about occurred "a significant period after the termination of the plaintiff in this case, but also it's completely removed from the Garden City plant. I think there's no testimony and nothing in this that – in her testimony at least, that would tie this to the management of IBP." (Trial transcript, p. 183). The district court further excluded Dombkowski's testimony on the basis of Federal Rule of Evidence 104(b), for failure to show that evidence relating to the Emporia plant, where Dombkowski had worked, applied to the Finney

County plant, and on the basis of Federal Rule of Evidence 403 relating to the raising of collateral issues and possibility of jury confusion. (Trial transcript, p. 185).

The district court made the same exclusionary ruling regarding proposed testimony of Tim Russell, another Emporia, Kansas, employee who had no knowledge of the Finney County plant or supervisors, or of the circumstances of Plaintiff's employment and discharge therefrom.

REASONS FOR DENYING WRIT OF CERTIORARI

I. SUMMARY OF ARGUMENT

This state common law cause of action for retaliatory discharge presents a fact-specific inquiry into the basis for Plaintiff's discharge for violations of Defendant's absenteeism policy. It does not raise any important issues of federal law. Kansas substantive law, which is applicable to the Defendant's motion for judgment as a matter of law, specifically includes, the Kansas Supreme Court's holding in *Ortega v. IBP, inc.*, 255 Kan. 513, 874 P.2d 1188 (1994), which provides that a plaintiff bears the burden in a retaliatory discharge case of establishing his cause of action by a preponderance of the evidence that is clear and convincing in nature. The district court correctly considered this higher evidentiary standard in ruling on the motion for judgment as a matter of law. "[T]here is no legally sufficient basis for a reasonable jury to find for the plaintiff on the issue of retaliation" in light of the applicable evidentiary standard of proof – preponderance of the evidence that is clear and convincing in nature. (Trial

transcript, pp. 430, 442). In particular, no evidence was presented at trial that reasonable jurors could have found, by a preponderance of the evidence that was clear and convincing in nature, established a causal connection between the exercise of rights under the Kansas Workers' Compensation Act and Plaintiff's discharge for unexcused absenteeism. The district court's entry of judgment as a matter of law in favor of Defendant, affirmed by the United States Court of Appeals for the Tenth Circuit, did not deprive Plaintiff of any constitutional right to jury trial, but rather complied fully with the requirements of Federal Rule of Civil Procedure 50(a). *See Galloway v. United States*, 319 U.S. 372, 389-392, 87 L.Ed. 1458, 1470-1471, 63 S.Ct. 1077 (1943). Finally, the district court's challenged evidentiary ruling was not an abuse of discretion because the proposed testimony of Dombkowski and Russell was not logically or reasonably tied to the decision to terminate Plaintiff.

II. ARGUMENT

A. Entry Of Judgment As A Matter Of Law In This Retaliatory Discharge Case Governed By Kansas Substantive Law Does Not Implicate Federal Constitutional Rights Of The Plaintiff

A petition for a writ of certiorari is granted only for compelling reasons and is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. The factors the Court considers in exercising its discretion to grant a petition for writ of certiorari include whether the decisions of two or more U.S. Courts of Appeals conflict

with each other as to "an important federal question" or if a Court has decided such a question of federal law "that has not been, but should be, settled by" the Supreme Court. Supreme Court Rule 10. "A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States court of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347, 114 L.Ed.2d 385, 391, 111 S.Ct. 1854 (1991).

In the present case, no important federal question is raised by the Tenth Circuit's affirmance of the district court's entry of judgment as a matter of law, no conflict in decisions among appellate courts exists, and no grounds for exercise of this Court's supervisory authority has been demonstrated.

In the first place, this case does not raise any substantial issues of federal law. Kansas substantive law governed Plaintiff's retaliatory discharge cause of action. It is well-established that a federal court is to consider the evidentiary burden applicable at trial in ruling on a motion for directed verdict or judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L.Ed.2d 265, 273-274, 106 S.Ct. 2548 (1986). This includes consideration of the heightened evidentiary standard imposed by the Kansas Supreme Court in *Ortega v. IBP, inc.*, 874 P.2d 1188 (1994), for plaintiffs who pursue common law claims of retaliatory discharge. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 91 L.Ed.2d 202, 213, 106 S.Ct. 2505 (1986).

Secondly, Plaintiff has not asserted that the Order and Judgment of the Tenth Circuit Court of Appeals is in

conflict with any decision of any other federal court of appeals or with a state appellate court. Plaintiff asserts that Kansas is unique in requiring clear and convincing evidence in support of a retaliatory discharge case. Whether or not this is true, the substantive evidentiary standard created under state law, and applied by federal district courts in diversity of citizenship cases as required under the *Erie* doctrine, is not an issue of federal law for which certiorari review is warranted.

Third, Plaintiff acknowledges that "the elements of retaliatory discharge contained in the court of appeals decision" are the correct ones. (Petition for writ of certiorari, at 6). An essential element of a prima facie case of retaliatory discharge under Kansas law is presentation of evidence of a causal connection between the employee's filing of a workers' compensation claim (or other exercise of rights under the Kansas Workers' Compensation Act) and the termination from employment. *Rosas v. IBP, inc.*, 869 F.Supp. 912, 914 (D.Kan. 1994); and *Pilcher v. Board of County Commissioners*, 14 Kan.App.2d 206, 213, 787 P.2d 1204 (1990). Plaintiff is not asserting that the district court or court of appeals relied on an erroneous rule of law in deciding whether sufficient evidence of such causal connection had been presented. Plaintiff is complaining only of erroneous findings of fact, that is, the application of the correct rule of law to the particular factual circumstances surrounding her termination. Both the district court and a three-judge panel of the Tenth Circuit Court of Appeals have reviewed the evidentiary record and determined that Plaintiff had not satisfied her burden of proof that reasonable jurors could have found, by a preponderance of the evidence that is clear and convincing

in nature, that Defendant discharged Plaintiff because she previously had filed a workers' compensation claim.

Plaintiff's belief that the application of Defendant's absenteeism policy to her unexcused absences on May 11 and 13, 1991, was unfair or unjustified does not raise a material question of fact that the decision was causally related to her filing of a workers' compensation claim. Furthermore, Plaintiff's illness of May 10, 1991 was not work-related, and absolutely no evidence was presented that Nimrick knew of her prior work-related injuries or the workers' compensation claim when he discharged her. "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue." Federal Rule of Civil Procedure 50(a)(1).

Finally, the underlying facts in this state law action for retaliatory discharge relate to a single employee, a single course of medical treatment, an attempt by a single employer to accommodate physical restrictions, a single physician's release to return to work, and the failure of a single employee to comply with her employer's attendance policy. No issue or matter of general importance is raised in Plaintiff's Petition for Writ of Certiorari.

B. No Important Question Of Federal Law Is Raised By The District Court's Evidentiary Ruling Regarding Testimony Of Other Employees

Plaintiff also seeks Supreme Court review of an evidentiary ruling of the district court excluding the testimony of two former employees who worked in the Emporia, Kansas plant. Such evidentiary rulings are reviewed pursuant to an abuse of discretion standard which requires the appealing party to demonstrate manifest injustice. *Thompson v. State Farm Fire & Casualty Co.*, 34 F.3d 932, 939 (10th Cir. 1994). While testimony of other employees as to their treatment by an employer may be relevant in assessing an employer's alleged retaliatory intent, the plaintiff must establish that the circumstances involving these other employees can "logically or reasonably be tied to the decision to terminate" the plaintiff. *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 n.2 (10th Cir. 1990). Otherwise, the testimony concerns collateral matters and does not tend to establish any pattern or practice of discrimination or retaliatory motive.

In the present case, Plaintiff proposed to introduce testimony of two former employees, neither of whom were ever employed at Defendant's Finney County plant, neither of whom knew anything about employment practices at that plant, neither of whom could testify about the actions or motives of any supervisory employee at that plant, and neither of whom could testify as to any company-wide management policy. (Trial transcript, pp. 173-178, 188). Dombkowski proposed to testify about alleged conversations she had with Bob Wallace, her supervisor at Defendant's Emporia, Kansas plant, which

allegedly occurred *after* October 1992. By contrast, Plaintiff worked at all times at Defendant's Finney County plant, was never supervised by Bob Wallace, and ended her employment with Defendant on May 14, 1991, a year and a half before Wallace's alleged comments.

Plaintiff did not produce any evidence that the purported testimony of Dombkowski or Russell showed that their situations were substantially similar to that of the Plaintiff in this case or that their testimony suggested a company-wide policy of retaliation against injured employees. The proposed testimony of Dombkowski and Russell was simply too attenuated to create any inference of retaliation in Plaintiff's case. In any event, the abuse of discretion evidentiary issue resolved in Defendant's favor by the Tenth Circuit Court of Appeals does not raise any important issue of federal law about which this Court should exercise its certiorari review authority. The challenged evidentiary decision was fact-specific.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied and the December 24, 1996, Order and Judgment of the United States Court of

Appeals for the Tenth Circuit should be affirmed in all respects.

Respectfully submitted,

*JOHN J. JURCYK, JR.
DOUGLAS M. GREENWALD
McANANY, VAN CLEAVE & PHILLIPS, P.A.
707 Minnesota Avenue, Fourth Floor
P.O. Box 171300
Kansas City, Kansas 66117
(913) 371-3838
(913) 371-4722 – Facsimile

Counsel for Respondent IBP, inc.

**Counsel of Record*